

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROGER D. ROSS)	
Claimant)	
VS.)	
)	
MORROW FOUNDRY, ALTERNATIVE)	
EMPLOYEE SOLUTIONS, SKILSTAF, INC., and)	
PACA, INC.)	Docket No. 270,258
Respondents)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY,)	
TRAVELERS INSURANCE COMPANY, and)	
NATIONAL FIRE INSURANCE COMPANY)	
OF HARTFORD)	
Insurance Carriers)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Skilstaf, Inc.¹ (Skilstaf) and its insurance carrier Liberty Mutual Insurance Company (Liberty Mutual) and claimant appealed the May 1, 2006, Award entered by Administrative Law Judge Thomas Klein. The Workers Compensation Board heard oral argument on August 8, 2006.

APPEARANCES

Patrick C. Smith of Pittsburg, Kansas, appeared for claimant. Janell Jenkins Foster of Wichita, Kansas, appeared for Morrow Foundry², Skilstaf, PACA, Inc.³ (PACA), and the

¹ Also referred to as PACA, Inc., in the record and the briefs filed with this Board. The appropriate spelling of Skilstaf is not certain but whatever the variation of the spelling it refers to the same company.

² R.H. Trans. at 5.

³ Application for Board of Appeals Review and Docketing Statement at 1 (filed May 16, 2006).

insurance carrier Liberty Mutual. For purposes of this appeal,⁴ M. Doug Bell of Coffeyville, Kansas, appeared for Morrow Foundry.⁵ John R. Emerson of Kansas City, Kansas, appeared for Skilstaf, PACA and National Fire Insurance Company of Hartford (National Fire).⁶ And finally, Matthew J. Schaefer of Wichita, Kansas, appeared for the Workers Compensation Fund (Fund).

In addition, Leigh C. Hudson of Fort Scott, Kansas, appeared in this claim on behalf of Alternative Employee Solutions and Travelers Insurance Company (Travelers). But Mr. Hudson did not appear in connection with this appeal as Alternative Employee Solutions and Travelers had previously settled with claimant.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Also, by Stipulated Order filed with the Division of Workers Compensation on January 10, 2005, the parties placed into the evidentiary record job search documents. In addition, by Stipulated Order filed with the Division on April 11, 2005, the parties stipulated claimant's average weekly wage at the time of his alleged injuries was \$300 per week. And by Stipulated Order filed with the Division on October 24, 2005, the parties placed into the evidentiary record the Workers Compensation and Employers Liability Policy of Liberty Mutual insuring Morrow Foundry, with an attached Labor Contractor Endorsement for Skilstaf and PACA.

The parties also stipulated that if the Workers Compensation Fund was assessed liability it would be given time to investigate the solvency of the employer and the insurance carriers.

ISSUES

This is a claim for injuries to claimant's back and upper extremities that allegedly occurred from September 4, 2001, through July 29, 2003, during the course of his

⁴ At page 5 of the November 6, 2002, preliminary hearing, Mr. Bell entered his appearance for Interstate Services.

⁵ At the October 5, 2004, regular hearing, Mr. Bell entered his appearance for Morrow Foundry without qualifications. But in his brief filed with the Board and at oral argument before the Board, Mr. Bell indicated he represented Morrow Foundry for only those periods Morrow did not have workers compensation insurance coverage, which were identified as November 1, 2001, through January 1, 2002, and January 1 through January 11, 2003.

⁶ Also referred to as CNA RSKCo in various places in the record.

employment with Morrow Foundry, which acquired claimant's services from at least two different employment agencies.

In the May 1, 2006, Award, Judge Klein determined the date of accident for claimant's injuries was July 29, 2003. The Judge also concluded claimant's permanent partial general disability was 41 percent, which was based upon a 57 percent task loss and a 25 percent wage loss. Accordingly, Judge Klein awarded claimant benefits for a 41 percent work disability (a permanent partial general disability greater than the whole person functional impairment rating). The Judge stated the entirety of the award was attributed to Liberty Mutual and assessed the Award against Morrow Foundry, Alternative Employee Solutions, Skilstaf, Travelers, American Casualty,⁷ National Fire, and RSKCo, for the alleged repetitive trauma injury claimant received through July 29, 2003, which was his last day working at Morrow Foundry.

Morrow Foundry, Skilstaf, PACA, and Liberty Mutual appealed the May 1, 2006, Award. They argue claimant was not an employee of Morrow Foundry as he was employed by employment agencies that assigned him to work at the foundry. They also argue claimant failed to prove he was an employee of any company that Liberty Mutual was insuring at the time of his alleged injuries. In addition, they argue the Judge erred in finding July 29, 2003, as the date of accident in this claim as the accident date for claimant's back should be either August 21, 2001, the approximate date claimant picked up a metal plate from the ground and experienced severe back pain, or the day in September 2001 when claimant was first taken off work by his treating physician. They contend claimant sustained no additional injury after the initial incident in August 2001.

Likewise, Morrow, Skilstaf, PACA, and Liberty Mutual argue the date of accident for claimant's bilateral upper extremity injuries should be in September 2001, when claimant was taken off work for several weeks. They also argue claimant failed to give timely notice of his accidental injuries to any insured of Liberty Mutual. In addition, they argue claimant failed to prove his task loss due to the bilateral upper extremity injuries and, therefore, the Board should adopt Dr. Russell J. Green's opinion that claimant has no task loss. And finally, they argue the Judge erred by finding a 25 percent wage loss as claimant allegedly retains the ability to earn a comparable wage. In short, Morrow, Skilstaf, PACA, and Liberty Mutual request the Board to deny claimant's request for benefits from them. In the alternative, they request the Board to reduce claimant's permanent partial general disability.

⁷ American Casualty is mentioned at page 6 of the regular hearing transcript when Mr. Bell advises the Judge that the insurance company is defunct.

Claimant also appealed the Award. Claimant contends Judge Klein erred by imputing a post-injury wage. Arguing his wage loss is 100 percent, claimant asserts his work disability is 78.5 percent when that wage loss is averaged with the 57 percent task loss. Therefore, claimant requests the Board to increase the May 1, 2006, Award.

Morrow Foundry contends the Award should be affirmed. It contends there is no evidence that claimant sustained an accidental injury during the brief periods it may have been uninsured.

The Workers Compensation Fund also contends the Award should be affirmed, asserting it has no liability in this claim.

Skilstaf, PACA and National Fire Insurance Company of Hartford, however, request the Board to order reimbursement of medical benefits and temporary total disability benefits they paid outside National Fire's coverage period.

The issues before the Board on this appeal are:

1. What is the appropriate date or dates of accident for claimant's injuries?
2. Who was claimant's employer on the date or dates of accident?
3. Did claimant provide timely notice of his accidental injuries?
4. What is the nature and extent of claimant's injuries and disability?
5. Is National Fire entitled to reimbursement for the temporary total disability benefits that accrued after its coverage ended and for the medical expenses that it paid for services that were rendered after its coverage ended?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

In early February 2001, claimant began working at Morrow Foundry, where he was assigned to work by an employment agency, Alternative Employee Solutions. Claimant worked eight to 10 hours per day, shoveling sand for most of those hours. Consequently, claimant developed symptoms in his neck, back, shoulders, and his hands. Claimant recalls two particular days that motivated him to seek medical treatment. On approximately August 21, 2001, claimant spent most of the day shoveling wet sand, which increased his

symptoms. And a few days later, claimant experienced severe back pain and fell to the ground while moving a heavy metal plate.

Claimant reported his symptoms to his supervisor at Morrow Foundry and was referred to Dr. Randall Herbel, the company physician. Dr. Herbel saw claimant in early September 2001 and took him off work.

Dr. Herbel referred claimant to Dr. Jay L. Bryngelson, an orthopedic specialist, who released claimant to work in mid-October 2001. At that juncture Morrow Foundry changed claimant's job duties and eliminated the shoveling. Claimant's new job duties, working with molds, were somewhat easier on his back but pushing and pulling the heavy molds bothered claimant's hands and wrists. As he continued that job, his upper extremity symptoms progressed.

Claimant discussed his symptoms with his supervisor at Morrow Foundry. And in mid-January 2002, claimant returned to Dr. Bryngelson for treatment to his hands. The doctor referred claimant for an EMG, which indicated claimant had bilateral carpal tunnel syndrome. Claimant's appointment to follow up with the doctor in February 2002 was cancelled as there was a dispute regarding insurance coverage. According to claimant, he wanted to continue with treatment for his hands but it was not allowed.

Claimant continued working at Morrow Foundry performing his regular job duties with the molds. After making additional complaints to Mona, Morrow Foundry's secretary, about having pain up and down his back and his hands, claimant was scheduled to see Dr. Bryngelson. The doctor saw claimant in May 2002 and prescribed medications and a splint. The doctor also recommended carpal tunnel release surgery. But, according to claimant, the doctor did not schedule surgery as the doctor had been advised by an insurance carrier (more likely than not Travelers who insured Alternative Employee Solutions until late 2001 or early 2002) that it would not pay for claimant's treatment.

Because of questions concerning who should be responsible for claimant's injuries, claimant's medical treatment was again delayed. Claimant continued working for respondent while his back and upper extremity symptoms increased. In August 2002, claimant sought medical treatment, principally for his back, at the Coffeyville Regional Medical Center. And in November 2002, claimant sought additional medical treatment in a preliminary hearing before Administrative Law Judge Jon L. Frobish. At that hearing, Alternative Employee Solutions and Travelers accepted responsibility for claimant's back injury. But Alternative Employee Solutions and Travelers denied responsibility for claimant's bilateral upper extremity problems.

Following the hearing, the Judge entered an order finding claimant's upper extremity injuries would have a date of accident after July 25, 2002, as those injuries resulted from

a repetitive use injury. And on January 27, 2003, the Judge issued an Order Nunc Pro Tunc that held Skilstaff, Inc., and its insurance carrier RSKCo (also referred to as CNA and National Fire in this claim) liable for claimant's carpal tunnel condition. The Order also added Alternative Employee Solutions and Skilstaff, Inc., as additional named respondents in this claim.

Claimant's medical treatment resumed. In January 2003, claimant underwent right carpal tunnel release surgery and in March 2003 claimant had left carpal tunnel release surgery. In April 2003, the doctor released claimant to work at his regular duties.

Claimant then returned to his job working with the molds. Claimant testified his neck, back, shoulders and hands worsened when he returned to work. And on July 29, 2003, claimant was terminated. According to claimant, he was fired after presenting Morrow Foundry with medical bills related to headaches that he believed were caused by the chemicals mixed into the sand at work. Conversely, the office manager at Morrow Foundry testified claimant was terminated because they were downsizing.

At the time of his October 2004 regular hearing, claimant had not found new employment. Claimant's unemployment benefits had expired in either January or February 2004 and claimant's sole source of income was selling scrap metal. At the regular hearing, claimant introduced documents showing that he had made approximately 77 contacts with potential employers from August 1 through December 15, 2003, and an additional approximately 52 contacts from July 2 through October 1, 2004. In addition, those documents included a list of 18 companies but there is no indication if those companies were contacted by claimant or what their significance might be. The parties also stipulated into evidence another list of contacts that claimant made between December 21, 2003, through the week of July 27, 2004. Those documents indicate claimant made an additional approximately 231 contacts during that seven-month period.⁸

When claimant testified at the regular hearing, he was continuing to experience symptoms in his hands and wrists and in his shoulders. Despite those symptoms, he was earning some money cutting up air conditioners with a reciprocating saw and selling the metal as scrap. Claimant testified that he had earned less than \$1,000 during 2004 selling scrap metal and that he had earned another \$50 working on a friend's car.

Claimant's attorney enlisted Dr. Edward J. Prostic to evaluate claimant for purposes of this claim. The doctor examined claimant in September 2003 and concluded claimant

⁸ The documents also include contacts made on dates that are listed in the regular hearing exhibit but with different contacts.

sustained a 17 percent whole person functional impairment under the *AMA Guides*⁹ (4th ed.) for the bilateral upper extremity injuries.¹⁰ The doctor concluded claimant should not perform work that required repetitious forceful gripping with either hand, particularly in the position of wrist flex. Moreover, the doctor opined that claimant sustained repeated minor trauma to his upper extremities during the course of his employment at Morrow Foundry.

Dr. Prostic reviewed a list of former work tasks performed by claimant during the 15 years before his last day of working for respondent. The list was prepared by claimant's labor market expert, Jerry D. Hardin. Excluding those tasks that Mr. Hardin determined were duplicates, Dr. Prostic concluded claimant had lost the ability to perform 16 of 29 tasks, or 55 percent, due to his bilateral carpal tunnel syndrome. The doctor questioned whether claimant was able to perform two more.

The only other medical expert to testify in this claim, Dr. Russell J. Green, examined claimant's neck, shoulders, and upper back in December 2003 and concluded claimant had a three percent whole person functional impairment under the *AMA Guides* (4th ed.) due to range of motion deficits in his shoulders. But the doctor did not know whether that impairment was due to claimant's work activities at Morrow Foundry. The doctor did not find any impairment in claimant's neck or upper back. Dr. Green did not believe claimant needed any work restrictions. Moreover, the doctor did not attempt to evaluate claimant's impairment due to his bilateral carpal tunnel syndrome.

Much of the confusion and complexity of this claim stems from the fact that claimant apparently was working for Morrow Foundry through different employment agencies, some of which changed their name. At the prehearing settlement conference, the parties advised the Judge that Morrow Foundry leased its employees from the following employment agencies: Alternative Employee Solutions (who was insured by Travelers), Interstate Administrative Services, followed by Skilstaf or PACA (who was initially insured by National Fire and later by Liberty Mutual).

Mr. Emerson (the attorney who appeared for Skilstaf, PACA, and National Fire):
Judge, I have the dates here. Morrow Foundry as I understand it is the principal employer and it subcontracted out its employees. Beginning the first day plead of 9-4-01 up until November 2001 Alternative Employees Solutions was the subcontractor or the temp service.

⁹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

¹⁰ At page 7 of his December 10, 2004, deposition, the doctor stated it was his understanding that "we're only concerned with the hand[s] today." Consequently, the doctor did not testify about the rating he gave for claimant's shoulders.

Mr. Hudson (the attorney who appeared for Alternative Employee Solutions and Travelers): Insured by Travelers.

Mr. Emerson: They were insured by the Travelers Group. Sometime in November 2001 until the beginning of 2002, January 1, 2002 Murrow *[sic]* itself appears to be uninsured and that's where the Fund comes in.

After that January 1, 2002 until July 25, 2002 Interstate Administrative Services was then hired and their insurer was the O'Ryan Group. They were represented by Doug Bell. He has since withdrawn. It's my understanding both entities are now insolvent.

. . . .

Mr. Emerson: Starting July 25, 2002 up until the last date Mr. Ross worked and I think that was July 29, '03, I'm getting one of two employers, either Skilstaff or a company known as PACA, Inc. became, the state shows it as insurance through Skilstaff and the insurance is as follows: July 25, 2002 through January, I'm sorry, December 31, 2002, the National Fire Insurance Company of Hartford was the carrier. They are CNA RSKCo. I represent them.

After that there is a period of time according to the state where there is no insurance for PACA or for Skillstaff or for Murrow *[sic]* and starting January 11, 2003 up until and I don't want to speak out of turn but up until the last day the Claimant worked for PACA or Stilstaff *[sic]*, they were insured through the assigned risk pool at Liberty Mutual Insurance Company.

Mr. Streit (the attorney who appeared for Morrow Foundry, Skilstaf, PACA, and Liberty Mutual): That's the information I have.¹¹

The brief filed with the Board on behalf of Skilstaf, PACA, and National Fire further described the relationship between Morrow Foundry and its employment agencies as follows:

The following stipulations are being made by Skilstaff (PACA): That for the purposes of this case, Skilstaff and PACA may be considered as one entity; That Skilstaff or PACA later became known as TOPE, Inc.; That Morrow Foundry contracted with Skilstaff (PACA) to provide workers compensation benefits to the employees working at the Morrow Foundry¹²

¹¹ Prehearing Settlement Conference Trans. at 8-10.

¹² Skilstaf, PACA, and National Fire's Brief at 2 (filed Feb. 27, 2006).

Moreover, the parties agreed to a Stipulated Order that was filed October 24, 2005, in which the Workers Compensation and Employers Liability Policy pertaining to Morrow Foundry, Skilstaf, and PACA was admitted into evidence. Page one of the document indicates that Morrow Foundry was the insured with a mailing address in care of Skilstaf, Inc., and PACA, Inc. The document also contains a Labor Contractor Endorsement identifying Skilstaf, Inc., and PACA as the labor contractor engaging in labor leasing at 1115 W. 12th Street in Coffeyville, Kansas, which happens to be the address shown for Morrow Foundry on another page in the document.

Furthermore, at the deposition of Becky Campbell the attorney appearing for Liberty Mutual offered exhibit nine, which was a March 25, 2003, letter from Professional Staffing, Inc., that indicates Professional Staffing had assigned its rights under the contract with Morrow Foundry to PACA, Inc. Ms. Campbell, who works as the office manager at Morrow Foundry, explained that Alternative Employee Solutions initially hired claimant. But in November 2001, Multistaff took over the employees at Morrow Foundry. Multistaff, however, changed its name to Mid South PEO Partners in April 2002 before Professional Staffing took over in July 2002. In addition, Professional Staffing later changed its name to Tope, Inc. Ms. Campbell was not familiar with either Skilstaf or PACA.

Ms. Campbell also testified that Morrow Foundry was a subsidiary of Tri-State Cast Technologies, Inc. (Tri-State), and that she was not aware whether Morrow Foundry was a business or corporate entity in its own right. More importantly, she indicated the employment agencies did not direct the daily activities of the workers provided by the employment agencies and that the employment agencies did not determine the number of employees that were needed to carry out Morrow Foundry's business operations. Conversely, Ms. Campbell testified the owners of Tri-State and Morrow Foundry actually determined whether the leased employees at the foundry would receive raises.

CONCLUSIONS OF LAW

1. What is the date of accident for the period that claimant sustained repetitive traumas to his upper extremities?

Dr. Prostic was the only medical expert witness to address claimant's bilateral carpal tunnel syndrome. According to Dr. Prostic, claimant sustained repetitive trauma injuries working at Morrow Foundry. Moreover, claimant testified his wrist symptoms worsened when he returned to his mold job duties following his bilateral carpal tunnel release surgeries. And those job duties caused claimant's bilateral upper extremity injuries in the first instance.

The Board concludes it is more probably true than not that claimant's bilateral carpal tunnel syndrome injuries continued through July 29, 2003, which was his last day of

working at Morrow Foundry. Consequently, July 29, 2003, is the appropriate date of accident for the series of repetitive traumas that claimant sustained working at Morrow Foundry.

2. Who was claimant's employer on the date of accident?

Liberty Mutual argues that it should not have any liability in this claim as the evidence fails to prove claimant was an employee of any company that it insured on the date of accident. The Board disagrees and finds the argument disingenuous. Indeed, that argument is contrary to the representations counsel made to the Judge at the prehearing settlement conference in which Liberty Mutual's counsel agreed that beginning in January 2003 claimant was working at Morrow Foundry as a leased employee through Skilstaf or PACA, which counsel for Liberty Mutual also represented in this claim.

There is no question claimant worked for a significant period of time at Morrow Foundry under its control. Morrow Foundry controlled every detail of claimant's work, retained the right to fire claimant, and even controlled whether claimant would receive a raise. Accordingly, the Board finds that claimant was an employee of both PACA, Inc., and Morrow Foundry on the date of accident, July 29, 2003. Indeed, the work claimant performed at Morrow Foundry over his two and one-half years of employment furthered the business interests of both Morrow Foundry and the various employment agencies.

The workers compensation insurance policy entered into the record indicates Morrow Foundry had workers compensation insurance coverage from Liberty Mutual on the date of the accident. Furthermore, the policy also identified Skilstaf, Inc., and PACA as labor contractors. Consequently, the Board finds that Liberty Mutual provided workers compensation insurance coverage for those employees working at Morrow Foundry.

The Board concludes claimant is entitled to receive workers compensation benefits for his upper extremity injuries from PACA, Inc., which had workers compensation insurance coverage from Liberty Mutual for the date of accident in question.

Kansas has long recognized that for purposes of the Workers Compensation Act a worker can be the employee of more than one employer at the same time. And when an employer lends a worker to another employer, the worker can look to either employer or both for workers compensation benefits.¹³

¹³ See *Scott v. Altmar, Inc.*, 272 Kan. 1280, 38 P.3d 673 (2002); *Bendure v. Great Lakes Pipe Line Co.*, 199 Kan. 696, 433 P.2d 558 (1967); *Bright v. Bragg*, 175 Kan. 404, 264 P.2d 494 (1953); and *Mendel v. Fort Scott Hydraulic Cement Co.*, 147 Kan. 719, 78 P.2d 868 (1938).

Where a general employer loans his workman to another and directs him to do certain work which is being done under the supervision and control of such other or special employer, and which work is also a part of the general employer's trade or business in which injuries are compensable under the compensation act, and the workman continues at all times in the employ of the general employer who pays his compensation and who remains vested with full power to discharge him for refusal to do the work for the special employer which he was directed to do, such employee, if injured while engaged in such work, may look to both employers and their respective insurance carriers for compensation.¹⁴

It is impossible to lay down a rule by which the status of a person performing a service for another can be definitely fixed as an employee, as ordinarily no single feature of the relation is determinative, but all must be considered together and each case must depend on its own peculiar facts. A number of factors have evidentiary value, the most important of which is the degree of control retained by the person for whom the work is being done. In order to determine the actual relationship of the parties under any employment, the courts will look to all the circumstances involved in the particular case.¹⁵

In addition to holding that no single fact is conclusive in determining the nature of the relationships between the parties in a workers compensation case, the Kansas Supreme Court has also held that an express contract is not required to prove a contract of employment. Instead, the conduct of the parties is sufficient to disclose an agreement between an employer and employee. The Kansas Supreme Court in *Casebeer*¹⁶ stated, in part:

Respondent and his carrier also argue that there was no contract of employment as to claimant's work as a welder and laborer.

In determining the actual relationship of parties under the Workmen's Compensation Act courts do not regard a single fact as conclusive but will look at all the facts and circumstances involved in a particular case. Our Workmen's Compensation Act does not require an express contract to establish its existence, the conduct of the parties being sufficient to disclose an agreement.

Moreover, when a general employer lends an employee to a second employer, the second employer becomes liable for workers compensation benefits when (1) the employee has made a contract of hire, express or implied, with the second employer, (2)

¹⁴ *Mendel*, 147 Kan. 719, Syl. ¶ 4.

¹⁵ *Bendure*, 199 Kan. 696, 703-704, citing *Mendel*, 147 Kan. 719, 722.

¹⁶ *Casebeer v. Casebeer*, 199 Kan. 806, 810-811, 433 P.2d 399 (1967) (citations omitted).

the work being performed is essentially that of the second employer, and (3) the second employer has the right to control the details of the work.¹⁷

K.S.A. 44-503 also applies to these facts. When a subcontractor undertakes work of a principal's trade or business, the principal may be liable for the workers compensation benefits to any worker who is injured performing that work. But when the subcontractor is subject to the Workers Compensation Act and the subcontractor has workers compensation insurance, the principal shall not be liable under the Act.¹⁸ Consequently, PACA, Inc., and its insurance carrier, Liberty Mutual, are responsible for claimant's workers compensation benefits in this claim.

3. Did claimant provide timely notice of his work-related injuries?

Claimant reported his symptoms to his supervisor at Morrow Foundry and was sent to the company doctor. Claimant's initial medical bills were provided by Travelers, which later settled its workers compensation claim with claimant regarding his back injury. As claimant's bilateral upper extremity injuries progressed, he advised his supervisor and was again sent to an authorized doctor and ultimately underwent bilateral carpal tunnel release surgeries. There is little question the office manager at Morrow Foundry, who was also an employee of the various employment agencies, had knowledge of claimant's work-related upper extremity injuries as she appears to be the person who made claimant's appointments with the company or authorized physician.

The Board concludes both Morrow Foundry and PACA, Inc., had timely notice of claimant's repetitive trauma injuries long before that trauma ceased. Accordingly, notice of the accident, as required by K.S.A. 44-520, was timely.

4. What is the nature and extent of claimant's injuries and disability?

Dr. Green could not relate the impairment in claimant's shoulders to his work at Morrow Foundry. Dr. Green did not address claimant's bilateral carpal tunnel syndrome. On the other hand, Dr. Prostic's initial medical report addressed the shoulders but at his deposition he was only asked to testify about or address the carpal tunnel syndrome. Moreover, Dr. Prostic's opinion regarding the nature and extent of claimant's bilateral carpal tunnel syndrome is uncontradicted.

¹⁷ *Scott*, 272 Kan. 1280, 1284; *Bendure*, 199 Kan. 696, Syl. ¶ 5.

¹⁸ K.S.A. 44-503(g).

Based upon Dr. Prostic's uncontradicted testimony, the Board finds and concludes claimant injured both upper extremities while working at Morrow Foundry to the extent that he sustained a 17 percent whole person functional impairment. In addition, the Board finds and concludes claimant lost the ability to perform 55 percent of the work tasks that he performed in the 15 years before he sustained his bilateral upper extremity injuries.

Claimant presented evidence that he made at least 360 contacts with potential employers over the 14 months between his termination in late July 2003 and his October 2004 regular hearing. That averages more than 25 contacts per month.

In the May 1, 2006, Award, the Judge found claimant's job search was sufficient to establish that claimant had made a good faith effort to seek other employment. But the Judge then imputed a post-injury wage of \$195 per week as the Judge believed claimant's testimony regarding the minimal income he made from selling scrap metal was not credible.

Claimant's testimony regarding the minimal income he received from selling scrap metal is uncontradicted and, therefore, should not be disregarded. The Board concludes claimant's endeavor does not comprise substantial and gainful employment. The income generated by claimant's endeavor is more akin to selling one's personal items than engaging in a true business activity or something equivalent to substantial and gainful employment. When considering the entire record, the Board concludes claimant has a 100 percent actual wage loss that should be used in the permanent partial general disability formula set forth in K.S.A. 44-510e.

Averaging claimant's 55 percent task loss with his 100 percent wage loss yields a permanent partial general disability of 78 percent. Accordingly, the Award should be modified to increase claimant's work disability from 41 percent to 78 percent.

5. Is National Fire entitled to reimbursement for the temporary total disability benefits that accrued after its coverage ended and for the medical expenses that it paid for services that were rendered after its coverage ended?

The parties stipulated to the various periods of insurance coverage. National Fire provided workers compensation insurance coverage during the period from July 25 through December 31, 2002. During the litigation of this claim, however, National Fire paid claimant temporary total disability benefits that accrued and medical expenses that were incurred outside the period of National Fire's coverage. National Fire now requests reimbursement for those payments.

Kansas law is now clear that in repetitive trauma claims each insurance carrier is responsible for the benefits incurred during its coverage period. As Liberty Mutual was the

insurance carrier during the period for which National Fire paid the temporary total disability benefits and medical expenses in question, Liberty Mutual is obligated to reimburse National Fire for those payments.

AWARD

WHEREFORE, the Board modifies the May 1, 2006, Award entered by Judge Klein.

Roger D. Ross is granted compensation from PACA, Inc., and Liberty Mutual Insurance Company for a July 29, 2003, accident and resulting disability. Based upon an average weekly wage of \$300, Mr. Ross is entitled to receive 13 weeks of temporary total disability benefits at \$200.01 per week, or \$2,600.13, plus 323.70 weeks of permanent partial general disability benefits at \$200.01 per week, or \$64,743.24, for a 78 percent permanent partial general disability and a total award of \$67,343.37.

As of October 10, 2006, Mr. Ross is entitled to receive 13 weeks of temporary total disability compensation at \$200.01 per week, or \$2,600.13, plus 154 weeks of permanent partial general disability compensation at \$200.01 per week, or \$30,801.54, for a total due and owing of \$33,401.67, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$33,941.70 shall be paid at \$200.01 per week until paid or until further order of the Director.

Authorized medical benefits are awarded against the insurance carrier who had coverage at the time the benefits were incurred. In the event there was no insurance coverage when a particular expense was incurred, then Morrow Foundry is responsible.

Reimbursement to National Fire Insurance Company of Hartford from Liberty Mutual Insurance Company is awarded to the extent National Fire paid temporary total disability benefits that accrued or medical benefits that were incurred during Liberty Mutual's coverage.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Janell Jenkins Foster, Attorney for Morrow Foundry, Skilstaf, PACA and
Liberty Mutual
M. Doug Bell, Attorney for Morrow Foundry
John R. Emerson, Attorney for Skilstaf, PACA and National Fire
Matthew J. Schaefer, Attorney for the Fund
Leigh C. Hudson, Attorney for Alternative Employee Solutions and Travelers
Thomas Klein, Administrative Law Judge